



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

999 18TH STREET - SUITE 300

DENVER, CO 80202-2466

<http://www.epa.gov/region08>

March 31, 2004

CERTIFIED MAIL #7003 2260 0001 7777 9419

RETURN RECEIPT REQUESTED

Ref: 8ENF-W

John Hubenka
7559 Riverview Road
Riverton, WY 82501

Re: Findings of Violation and
Administrative Order for
Compliance
Docket No. **CWA-08-2004-0035**

Dear Mr. Hubenka:

Based on our review of all available information, the United States Environmental Protection Agency (EPA) has determined that you are in violation of the Clean Water Act, as amended (CWA). The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of pollutants (i.e., dredged or fill material) into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 CFR § 328.3.

Specifically, you have discharged dredged and fill material into waters of the United States without authorization under the CWA. These discharges of pollutants into the Wind River have occurred on your property, portions of which are located within section 33, Township 2 North, Range 2 East; section 4, Township 1 North, Range 2 East; and section 3, Township 1 North, Range 2 East in Fremont County, Wyoming.

Enclosed is an EPA Region 8 administrative order which specifies the nature of the violations and describes actions necessary in order for you to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). The order requires you to inform EPA in writing, within five days of receipt, of your intent to fully comply with the order.

The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including filing of a civil



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or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that the issuance of this order does not preclude civil or criminal actions in the U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). SBREFA does not eliminate your responsibility to comply with the Act or this order, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

Please review the order carefully. If you have any questions, the most knowledgeable people on my staff are Wendy Silver, Enforcement Attorney, at 303-312-6637 and Monica Heimdal, Enforcement Officer, at 303-312-6359.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures

1. Findings of Violation and Administrative Order for Compliance
2. SBREFA Information Sheet

cc: Tina Artemis, EPA, Regional Hearing Clerk, w/enclosures
Matthew A. Bilodeau, U.S. Army Corps of Engineers, w/enclosures
David L. Lagrone, U.S. Army Corps of Engineers, w/enclosures
Jeremy Lyon, Wyoming Department of Environmental Quality, w/enclosures

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	FINDINGS OF VIOLATION AND
)	ADMINISTRATIVE ORDER FOR
John Hubenka)	COMPLIANCE
7559 Riverview Road)	
Riverton, WY 82501)	
)	Docket No. CWA-08-2004-0035
)	
Respondent.)	
_____)	

I. STATUTORY AUTHORITY

This Findings of Violation and Administrative Order for Compliance (“Order”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by section 309 of the Clean Water Act (“CWA”), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

1. Respondent is an individual residing in Riverton, Wyoming.
2. At all relevant times, Respondent owned, controlled, and/or operated property located approximately 19 miles west of Riverton, along the Wind River, in Fremont County, Wyoming. The property is partially located within section 33, Township 2 North,

Range 2 East; section 4, Township 1 North, Range 2 East; and section 3, Township 1 North, Range 2 East in Fremont County.

3. The Wind River flows in a southeasterly direction through the property sections described above. Although it does not serve as a legal property boundary, the Wind River generally separates the property owned by Respondent, located north of the river, from the Wind River Indian Reservation of the Eastern Shoshone and Northern Arapaho Tribes, located south of the river.
4. The Wind River is and was at all relevant times a navigable water. The Wind River is tributary to the Big Horn River, which is tributary to the Yellowstone River, which is tributary to the Missouri River. The Big Horn River, Yellowstone River, and Missouri River are, and were at all relevant times, navigable, interstate waters.
5. On October 16, 2000, the U.S. Fish and Wildlife Service (“USFWS”) inspected Respondent’s property in response to a complaint it had received October 10, 2000, and found that a large dike had been constructed of riverbed material across the main channel of the Wind River. Approximately 1½ miles upstream from this dike, the river splits into two channels—a north channel, which is the main channel, and a south channel, which serves as an overflow channel during periods of high flows. Prior to its construction, the channels joined downstream of the dike. Because there was no water flowing in the main channel at the site of the dike, USFWS determined that an additional dike had been constructed upstream in the main channel, diverting the Wind River to the south channel.
6. On October 17, 2000, USFWS notified the U.S. Army Corps of Engineers (“Corps”) of alleged unauthorized discharges of dredged and fill material on Respondent’s property. Based on information provided by USFWS and an interview with Respondent conducted by

the Corps, the Corps issued a cease and desist order to Respondent on November 2, 2000, finding that Respondent discharged dredged and fill material and/or caused dredged and fill material to be discharged into the Wind River for the purpose of constructing one or more dikes across the river. A third dike on Respondent's property, located within and across a branch of the north channel approximately 1000 feet downstream of the first dike, was subsequently discovered by USFWS during a routine flyover of the area. Most, if not all, of the work described above was performed on or about March 1, 1999, through on or about November 1, 1999.

7. The activities described in paragraphs 5 and 6 of Section II of this Order resulted in the diversion and alteration of flow of the Wind River so that it flowed further south, within the south channel, into the Wind River Indian Reservation, rendering inaccessible to the Tribe over 300 acres of tribal property used to graze cattle that, prior to the construction of the dikes, was located south of the river but now is located north of the river. In addition, the hydraulic characteristics of the north and south channels, as well as their potential for flood-flow attenuation, have been adversely impacted as a result of Respondent's activities.
8. The activities described in paragraphs 5 and 6 of Section II of this Order were performed using common earthmoving equipment, including a Caterpillar tractor, which was operated by Respondent or by somebody on behalf of Respondent.
9. Respondent is a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
10. The discharged dredged and fill material referenced in paragraph 6 of Section II of this Order is and was at all relevant times "dredged material" and "fill material" within the meaning of 33 CFR § 323.2(c) and 33 CFR § 323.2(e), respectively, and "pollutants" within the meaning

of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

11. The equipment described in paragraph 8 of Section II of this Order is and was at all relevant times a “point source” within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).
12. The Wind River referenced in paragraphs 2 through 7 of Section II of this Order is and was at all relevant times “waters of the United States” within the meaning of 33 CFR § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).
13. The placement of dredged and fill material into the Wind River constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
14. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.
15. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.
16. 33 CFR § 323.3(a) specifies that, unless exempted pursuant to 33 CFR § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
17. Respondent is not and never has been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraphs 5 and 6 of Section II of this Order.

18. Respondent's activities described in paragraphs 5 and 6 of Section II of this Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondent into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).
19. The removal of the dredged and fill material illegally discharged into waters of the United States at Respondent's property and restoration of the impacted waters to a condition that closely approximates their condition and function prior to the discharge of the dredged and fill material, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.
20. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The removal and restoration described in paragraph 19 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondent's unpermitted activities.
21. This Order was issued after consultation and coordination with the Corps' Omaha District.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby

ORDERED:

1. Respondent shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.
2. Respondent shall remove all dredged and fill material that was discharged as a result of the violations identified in this Order and restore the areas of the Wind River impacted by those violations to their pre-impact conditions and grade, unless EPA approves otherwise.
3. Within five (5) calendar days of receipt of this Order, Respondent shall inform EPA in writing of Respondent's intent to fully comply with the Order. EPA requests that Respondent meet with EPA within fourteen (14) calendar days of issuance of this Order if there are concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondent's responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondent by EPA.
4. All dredged and fill material removal and restoration activities shall be conducted in accordance with an EPA-approved restoration plan prepared by a consultant experienced in stream and wetland restoration whose qualifications are acceptable to EPA. The consultant also shall directly supervise all work performed pursuant to the EPA-approved restoration plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.

5. All dredged and fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in stream and wetland restoration whose qualifications are acceptable to EPA. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
6. Within seven (7) calendar days of any disapproval by EPA of the qualifications of the consultant or equipment operator referenced in paragraphs 4 and 5 of Section III of this Order, Respondent shall submit the professional resume of an individual who has the qualifications and experience stated in paragraphs 4 and 5 of Section III of this Order.
7. Within forty-five (45) calendar days of receipt of this Order, Respondent shall submit to EPA for review and comment a Restoration Plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for removing the unauthorized dredged and fill material from the Wind River and restoring the Wind River to its pre-impact channel configuration and grade.
8. The Restoration Plan shall be prepared in accordance with "U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans," attached hereto as Exhibit A. In addition, the Restoration Plan shall include:
 - a. A detailed work plan and schedule for all of the work to be accomplished by the Restoration Plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than sixty (60) days after EPA approves the Restoration Plan; and

- b. Detailed professional drawings of the restoration site, including plan and profile drawings with control elevations for pre-impact conditions, current conditions, and proposed restoration conditions. Deviations between pre-impact conditions and proposed restoration conditions shall be itemized, and detailed technical justifications for such deviations shall be provided.
9. EPA will review the Restoration Plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the Restoration Plan, Respondent shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
10. Upon receiving EPA's written approval of the Restoration Plan, Respondent shall obtain all necessary permits to implement the EPA-approved plan and then commence restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondent shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.
11. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondent shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If required, Respondent shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 10 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers
Wyoming Regulatory Office
2232 Dell Range Boulevard, Suite 210

Cheyenne, WY 82009-4942
Telephone: 307-772-2300

12. Respondent shall submit three (3) copies of the Restoration Plan, all notifications, and related correspondence to:

Monica Heimdal, 8ENF-W
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

Telephone: 303-312-6359
Facsimile: 303-312-6409

A copy of the restoration plan, all notifications, and related correspondence also shall be provided to:

Wendy Silver, 8ENF-L
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6637
Facsimile: 303-312-6953

13. Any deliverables, plans, reports, specifications, schedules, and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.
14. Respondent shall allow or use Respondent's best efforts to allow access by any authorized representatives of EPA or its contractors, the Corps, USFWS, the Natural Resources Conservation Service, the Wyoming Department of Environmental Quality, and the Wyoming Game and Fish Department, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Order;
- b. To inspect and monitor compliance with this Order; and
- c. To verify and evaluate data and other information submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

- 15. If Respondent transfers ownership of or leases, in whole or in part, any portion of the site where restoration is to occur before he has fulfilled his obligations under this Order, Respondent shall provide a copy of this Order and the Restoration Plan to the transferee or lessee not less than thirty (30) calendar days prior to the transfer or lease. A transfer or lease of interest shall not relieve Respondent of any responsibility under this Order unless EPA, Respondent, and the transferee or lessee agree in writing to allow the transferee or lessee to assume such responsibility. Additionally, thirty (30) calendar days prior to such transfer or lease, Respondent shall notify EPA at the addresses specified in paragraph 12 of Section III of this Order.
- 16. This Order shall be effective upon receipt by Respondent.
- 17. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 per day for each violation thereafter of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a). Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the

CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.

18. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondent of Respondent's obligation to comply with any applicable Federal, state, or local law or regulation. Failure by Respondent to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 30TH day of March, 2004.

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

**IF YOU WOULD LIKE TO HAVE COPIES OF THE ATTACHMENTS, PLEASE
CONTACT THE REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON MARCH 31, 2004.